IN THE HIGH COURT OF BOMBAY AT GOA

Criminal Appeals Nos. 45 of 2000, 46 of 2000, 47 of 2000, 48 of 2000, 49 of 2000, 50 of 2000, 51 of 2000, 52 of 2000, 53 of 2000, 54 of 2000,and 55 of 2000.

CRIMINAL APPEAL NO.45 OF 2000

Shri Vassu Shankar Naik,
r/o Chicalim,Bardez,Goa .... APPELLANT

versus

S T A T E .... RESPONDENT

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CRIMINAL APPEAL NO.46 OF 2000

Smt. Parvati w/o Shankar Naik,
r/o Chicalim,Bardez, Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.47 OF 2000

Shri Vinayak Sadashiv Naik,
r/o Chicalim,Bardez, Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.48 OF 2000

Shri Mahesh Shankar Naik,
r/o Chicalim,Bardez, Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.49 OF 2000

Shri Ganesh V. Rivodkar,
r/o Chicalim, Bardez,Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.50 OF 2000

Shri Damu Krishna Naik,
r/o Chicalim,Bardez,Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.51 OF 2000

Shri Krishna Shankar Naik,
r/o Chicalim,Bardez,Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.52 OF 2000

Shri Babaji Ladu Dhargalkar,
r/o Chicalim,Bardez, Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.53 OF 2000

Shri Eknath Sadashiv Naik,
r/o Chicalim, Bardez, Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.54 OF 2000

Shri Lavu Sadashiv Naik,
r/o Chicalim, Bardez, Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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CRIMINAL APPEAL NO.55 OF 2000

Shri Vassant Chandon Dharwadkar,
r/o Chicalim,Bardez, Goa ... APPELLANT

versus

S T A T E ... RESPONDENT

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Mr. S.D. Lotlikar, Sr. Advocate, with Mrs. Sonali Samant, Advocate, for the Appellants in all the Appeals.

Mr. A.P. Lawande, Public Prosecutor for the State/Respondent in all the Appeals.

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**CORAM : P.V. KAKADE,J.**

Dated : October 10, 2002.

ORAL JUDGMENT

All these Appeals are being disposed of by this common Judgment, as they arise out of Judgment and the Order passed by the IInd Additional Sessions Judge, Panaji, on 17-8-2000 wherein all the Appellants were convicted and consequently sentenced for commission of the various offences in Sessions Case No.10 of 1998.

All the Appellants were convicted for committing offences punishable under Section 454 r/w 149, Section 397 r/w 149, Section 427 r/w 149, Section 323 r/w 149 and Section 326 r/w 149 of the Indian Penal Code, to various terms and amounts of

fine.

2. The facts giving rise to the case, in brief, are thus:-

In all 32 accused persons acting in furtherance of common object, formed unlawful assembly on 30-5-1987 at about 2.00 p.m. at Chicalim village, armed with crow-bars, wooden dandas and broke open the door of the liquor shop-cum-residence of the complainant and his family members and assaulted them inflicting grievous injuries on the complainant's brother and simple injuries on complainant and other family members. At that time, they also allegedly caused damage to the articles in the house and decamped with cash and gold ornaments. The complainant P.W.1 filed police complaint on the same day naming all the 32 accused persons for commission of the offences under Sections 143, 147, 454, 326, 395 r/w Section 397 and Section 427 r/w 149, of the Indian Penal Code. The case was eventually committed to the Court of Sessions. The learned Sessions Judge framed the charge against all the accused persons to which all the accused pleaded not guilty and claimed to be tried. The prosecution led its evidence and on the basis of the said evidence the

learned trial Judge found that the prosecution had failed to prove that the accused persons had committed offence punishable under Sections 143, 147, 148 r/w Section 149 of the I.P. Code. However, she found that 11 out of the 32 accused persons were proved to be guilty for commission of the offences punishable under Sections 454 r/w 149, Section 326 r/w 149, Section 397 r/w 149, Section 427 r/w 149 and Section 323 r/w 149 of I.P. Code and, accordingly, sentenced them to various terms of prison and imposed fine upon them. Hence the Appeals.

3. I heard Mr. Lotlikar, the learned Counsel for the Appellants, and Mr. Lawande, the learned Public Prosecutor, at length, who took me through the entire evidence on record as well as the Judgment of the lower Court.

4. At the outset, I must note that the learned trial Judge has basically fallen in error while she held that there was no element of unlawful assembly involved in the case and, therefore, acquitted all the accused persons for commission of the offences under Sections 143, 147, 148 r/w 149 I.P.C., and still she has recorded finding to the effect that 11 out of the said

accused persons, were liable to be convicted for commission of various offences with the aid of Section 149 of the I.P. Code.

Now, the scheme of the Chapter VIII and, more particularly, the impugned counts of the Indian Penal Code relied upon by the trial Judge would show that the unlawful assembly would be such which would be an assembly of 5 or more persons and common object of the persons composing that assembly would be any of the acts described in Section 141 of the Indian Penal Code. In other words, to form unlawful assembly it is necessary that presence of 5 or more persons is required in law with the common object to commit the acts described in the said provision. Section 143 of the Indian Penal Code describes the punishment for the unlawful assembly. Section 147 defines the punishment for rioting and stipulates that whoever is guilty of rioting shall be punished accordingly under that provision. The offence of rioting would be there whenever force or violence is used by the unlawful assembly, or by any member thereof, in prosecution of common object of such assembly, and every member of such assembly would be guilty of offence of rioting. Section 148 would come into picture when the offence of rioting is committed by

the members who are armed with deadly weapons. Finally, Section 149 stipulates that every member of the unlawful assembly would be guilty of offence committed in prosecution of the common object and lays down that if an offence is committed by any member of the unlawful assembly in prosecution of common object of such assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, would be guilty of that offence.

Therefore, in my considered view when all the accused were held not guilty for commission of the offence punishable under Sections 143, 147, 148 and 149 of the I.P. Code, they again could not be found guilty of various offences with the aid of Section 149 of the I.P. Code. In other words, when it is found that there was no unlawful assembly, or no offence of riot was committed at all by any member of the group, the sentence recorded against 11 of the said accused persons would be erroneous and the trial in that regard would stand vitiated.

5. This aspect apart, even on merits

the case would not withstand critical judicial scrutiny. Initially, it must be noted that the alleged offence is committed on 30th May, 1987, whereas the trial is conducted in the month of August and September 1998, i.e. more than 11 years after the incident. It is pertinent to note that the learned trial Judge has relied upon the identification by some witnesses of 11 accused persons in the course of the trial during their testimony, i.e. 11 years after the actual incident. There is no identification parade held at all. I have critically perused the testimony of P.W.1 Ranjeet, who is Advocate by profession, vis-a-vis his F.I.R. recorded on the same day wherein names of 32 accused persons were mentioned to be the culprits. However, if the testimony and the F.I.R. are read in juxtaposition with each other, there appear several material discrepancies so as to render the testimony unreliable. It cannot be overlooked that the complainant is an Advocate and should know what he was testifying before the Court 11 years after the actual incident. He has never explained as to why he named 32 persons in his F.I.R. when in the course of testimony he has categorically stated that only 11 persons entered in his house. In fact, his testimony as well as the testimonies of some other

witnesses are harping upon the figure 11 and, obviously, have targeted the 11 Appellants for the purpose of pinning them down for the alleged acts. Be that as it may, the fact remains that the complainant and other witnesses have not explained the obvious anomaly as to why only 11 persons are being named repeatedly when all 32 accused persons were named in the F.I.R. initially. It is also found that the F.I.R. as well as the depositions are vague on several aspects and, therefore, the testimony of P.W.1 is rendered doubtful.

6. Similar would be the case with regard to so called eye witnesses P.W.4 Sagun Satardekar, P.W.5 Reshma Kerkar, P.W.7 Tulshi Naik and P.W.8 Tulshi Satardekar. P.W.4, P.W.5 and P.W.8 are brother, niece and mother of the complainant, respectively. The statement of P.W.4 is recorded by Police on 30-7-1987 whereas that of P.W.7 Tulshi Naik is recorded on 12-7-1987, i.e. about 2 months after the incident and such delay is never explained by the prosecution in any manner. P.W.4 Sagun, surprisingly, does not name any person who entered their house, in police statement, but refers to some name in the course of his testimony. This anomaly is not explained. He only says that all accused persons entered the house which would

not be sufficient at all for our purpose. P.W.7 Tulshi Naik is examined as an independent witness. But, significantly again, this witness Tulshi Naik is not mentioned by any witness and, therefore, her presence on the spot is rendered doubtful. P.W.8 Tulshi Satardekar is the mother of the complainant. She is also an injured person, but her testimony cannot be relied upon because she has involved some third persons also to be the culprits which is not the prosecution case at all.

In short, the ocular testimonies of the witnesses including the complainant, are not reliable. The learned trial Judge, in fact, was required to note particular acts of particular accused persons when she had held earlier that they could not be convicted for commission of the offences under Sections 143, 147, 148 and 149 of the I.P.Code and still she has held them guilty of various counts with the aid of Section 149 of the I.P. Code which cannot be allowed in law. It is obvious from the record that the statements of the witnesses were recorded by the Police months after the incident. Then again, the trial was unduly delayed and has taken plus 11 years after the incident and such delay has remained unexplained by the prosecution. There is also no evidence on

record for alleged serious offences contemplated under Sections 326 and 397 of the I.P. Code. No doubt, there is evidence regarding injuries on the persons of the witnesses and, therefore, at the most, one can say that incident of assault by a group of people did take place at the relevant time, however, there is no sufficient evidence on record to show that these 11 Appellants were the culprits who have committed the crime contemplated under Sections 427, 323 and 325 of the I.P. Code for want of independent evidence against them.

7. In the result, perusal of the evidence vis-a-vis Judgment of the lower Court shows that the learned Sessions Judge has fallen in technical error while taking aid of Section 149 of the I.P. Code to convict the Appellants for the impugned offences. Also there is no independent evidence to pinpoint the Appellants for particular acts which would amount to commission of the offences under the particular counts independently. In view of this position, I have no option but to set aside the Order of conviction and sentence passed by the learned Sessions Judge and acquit the Appellants for want of cogent and conclusive evidence against them.

8. Hence the Appeals are allowed. The Order passed by the IInd Additional Sessions Judge, Panaji, dated 17-08-2000 in Sessions Case No.10 of 1998 convicting and passing sentence against the Appellants is hereby set aside and all the Appellants are acquitted of the offences with which they were charged. The fine amount, if paid, shall be refunded to the Appellants. Bail bonds to stand cancelled.

**P.V. KAKADE,J.**

ac.